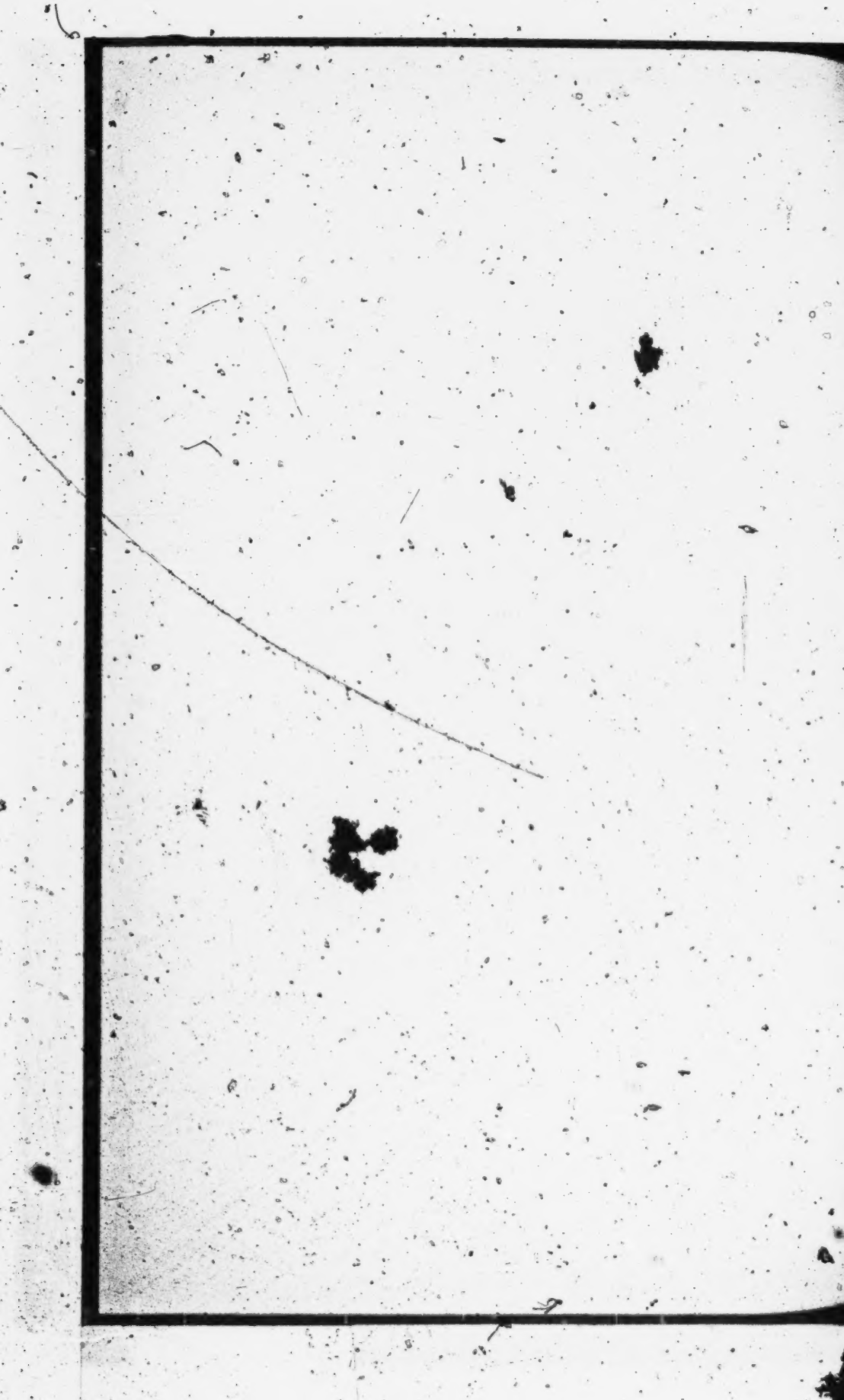

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CHARLES ELMORE CR
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1931

NO. 401

AMERICAN SURETY COMPANY OF NEW YORK,
Petitioner,

v.

THE GREEK CATHOLIC UNION.

BRIEF OF RESPONDENT TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

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BRIEF FOR RESPONDENT.

In opposition to this Petition for review of the judgment of the Circuit Court of Appeals in this case, we, on behalf of the Greek Catholic Union, take the position, that this case is not one which requires, or justifies review by this Honorable Court, and present reasons in support of this, our position, as follows:

There is no Federal question involved in this case. The whole question here is one of ordinary commercial law. There is no conflict of decisions of the Circuit Court of Appeals involved. There is no question of local

law upon which this decision is in conflict with the applicable local decisions; on the contrary the decision and the reasons for it follow and are in harmony with the decisions on the same and similar questions of the Courts of the State of Pennsylvania, where the case arose and was tried, as well as in harmony with decisions of this Court and of other Federal Courts in like cases; and the procedure followed by the Courts below in the case was in full conformity with the usual and accepted course of proceedings in such cases.

The only point at which any attack can be made upon this judgment, in compliance with the provisions of Rule 38, of this Court, is to attempt to classify this case, as one in which an important question of general law has been decided by the Circuit Court of Appeals, "in a way probably untenable and in conflict with the weight of authority."

We contend that such is not the case. While an important question of general law has been here decided, the decision is not untenable nor contrary to the weight of authority, but quite the reverse.

The petitioner, defendant below, is complaining because it has been held liable on its bond given to secure the respondent, from loss by reason of the failure of George Kondor, also a defendant below, to fulfill his duties as Treasurer of the Greek Catholic Union Society, —the respondent, the plaintiff below.

The said George Kondor was guilty of default in his duties and obligations as such treasurer, and had breached the bond in this suit. The petitioner's contention on the trial was that it was released from its obligations as surety on said bond, by the actions of the respondent *after the breach of the bond, by said principal, George Kondor, had occurred.*

What the respondent did in this matter was this:—After it was ascertained that said Kondor was in default, in the safe keeping of the funds of the respondent, because he kept on deposit a large part of respondent's funds, in an insolvent bank of which he, Kondor, was president, and a director, viz. The Peoples Bank of Johnstown, Pa.,—as well as in default in his conduct as such treasurer, in some other points,—whereby there was certainty of great loss to the respondent,—much exceeding the amount of $100,000.00 for which it was secured by said bond, the responsible officers of the respondent, made an agreement with another bank, which was known to be sound and solvent, to wit, The United States Trust Company of Johnstown, Pa., to leave in the latter bank on deposit $200,000.00 without interest for four years, if said Trust Company would take over said Peoples Bank and pay off the depositors thereof, including respondent. This arrangement and agreement was made with the advice and co-operation of the Banking Commissioner of the State of Pennsylvania, who had taken possession and control of said Peoples Bank, and threatened that if such an arrangement was not made, the said Peoples Bank would be immediately closed, and placed in process of forced liquidation.

This situation developed on a Saturday, and the Peoples Bank would not be permitted by said Commissioner of Banking to open on the morning of the following Monday, unless some arrangement satisfactory to him, could be made on Sunday to secure the depositors of said Bank. The facts of this situation are shown on the Record of the pleadings at p. 12, and of the evidence at pp. 90-91, 120-121.

There was here created an emergency. What action was to be taken had to be taken between Saturday afternoon and Monday morning. It is not true that no effort

was made to obtain co-operation and consent of the Surety Company, in the premises. The evidence shows that on Saturday evening one of the Surety's Company officers in Pittsburgh, a Vice-President, was communicated with and at his direction on the following Sunday morning an official of the Company in New York, who was the head of the claim department, was communicated with by telephone. Both these officials of the Company declared that nothing could be done because the day was Sunday and there was no time for their action (Record pp. 140-141). The respondent's officers were therefore left to take care of the situation themselves, and they did so with the purpose in mind to minimize the loss as much as possible, both for the respondent and for the Surety Company. The agreement with the United States Trust Company of Johnstown assured the respondent of the eventual recovery of $200,000.00 of its deposit, then in jeopardy, in said Peoples Bank of Johnstown, with the loss of four years interest on said sum, whereby their ultimate loss would be much less than all the estimates made by the Company's officers and by the State Banking Commissioner at that time showed to be practically certain; and the loss to the Surety Company was much less than it would have been if it had been obliged to pay the full amount of its surety bond, to wit, $100,000.00. All the judgment in this case requires of the Surety Company is that it should pay the lost interest on the impounded deposit of $200,000.00, which is calculated at $41,600.00 with interest. The respondent ultimately received its $200,000.00 deposit, but totally lost all said interest. The facts in regard to this appear on p. 124 of the Record.

It thus appears that the agreement which was made with the Trust Company would greatly minimize the loss which the Surety Company would have had to pay if that agreement had not been made. So the agreement

was indeed one for the benefit of the Surety Company, even more than for the benefit of the Greek Catholic Union.

As stated there was an emergency here which required immediate action to prevent the Peoples Bank being closed and put in liquidation by the State Banking Commissioner on the following Monday morning. We contend that the respondent was fully justified in its action without the consent of the Surety for reasons stated thus: The rule of *strictissimi juris* which the petitioner invokes for its protection does not apply here. That rule applies in the case of ordinary sureties, but not in the case of a surety bond like this made by a corporation engaged in that very business. Such a corporation engaged in the business of insuring for pay the fidelity of employees, is an insurance company, and its liability is to be judged and determined by rules and principles which apply to insurance contracts, and not by such rules as apply to ordinary contracts of suretyship. This principle is thoroughly established by decisions of both the Federal Courts and the Courts of the State of Pennsylvania.

American Surety Company v. Pauly, 170 U. S. 133;
U. S. F. & G. Company v. Golden Brick Co., 191 U. S. 416;
Young v. American Bonding Co., 228 Pa. 373;
Philadelphia v. Fidelity & D. Co., 231 Pa. 208;
Brown v. Title Guaranty & Surety Co., 232 Pa. 337;
Philadelphia v. Ray, 266 Pa. 345;
M. E. Church of Franklin v. Equitable Surety Co., 269 Pa. 411;
Sokoloff v. Fidelity & Cas. Co. of N. Y., 288 Pa. 211;

Conroy v. Commercial Gas Co., 292 Pa. 219.

Also Note:

Hormel v. American Bonding Co., 33 L. R. A. (N. S.) 513;

1 Cooley's Briefs on Insurance, p. 9.

The situation in which the respondent was placed was analogous to a case of insured goods in a burning building. By insurance law the owner of such goods has the right to remove them from the building, without consent of the insurance company, and does not forfeit his insurance by reason of such action, though the goods were stolen or damaged by the elements in the place to which they were removed. So also in case of a marine disaster the master may jettison cargo, without forfeiting the insurance thereon even though it be proved that afterward the ship got safe to port, and the cargo would have been saved.

Insurance Co. v. Agnew, 34 Pa. 96;

Insurance Co. v. Cuff, 35 L. R. A. (N. S.) 892;

Insurance Co. v. Patterson Drug Co., L. R. A. 1917 D p. 1091;

Cooley's Briefs on Insurance, 3065.

The petitioner lays the chief stress of its contention in the defense it is making on the point that the agreement with the U. S. Trust Company, as it alleges, varies the obligation of the petitioner under said surety bond, and substitutes a new risk to its prejudice. This is not true. The agreement with the Trust Company was made after the breach of the Surety Bond had occurred, and the liability of the petitioner to make good any loss sustained by the respondent had been fixed. The only thing then left to do was to ascertain the amount of the respondent's loss; and it was to that point that the agreement with the Trust Company was directed. The petitioner was bound to the amount of $100,000.00, but all

the evidence shows (Record pp. 82-121) that if the Peoples Bank closed and went into liquidation, the respondent's loss would greatly exceed that amount. Under the agreement, the amount of loss would be confined to loss of interest on the impounded deposit, and that has been calculated to be $41,600.00, and that is all the petitioner as insurer on its bond is held liable for; a great saving to it. Of course, as petitioner has resisted payment of this obligation since April, 1928, interest has accrued upon this sum which is that much additional loss to respondent, and is to be so accounted for by the petitioner.

The only answer which the petitioner makes to this point of argument is that the contract made with the U. S. Trust Company varied the terms of the original contract upon which it had given its bond, because it prevented the Surety Company from having any opportunity to take over the assets of the defaulting bank and liquidate said assets so that it might not lose as much as it did under this judgment.

This argument is fallacious. The only alternative to the making of said agreement, as was made, was that the Pennsylvania State Banking Commissioner would take over the defaulting bank, close it and place it in process of forced liquidation in the usual method in such cases, that is, by a receiver appointed by the Banking Commissioner. The petitioner would have had no chance whatever to get the assets of the defaulting bank into its control for liquidation, unless, perhaps, it had been willing to give security satisfactory to the Banking Commissioner that all the obligations of the defaulting bank to its depositors, and also to its stockholders, would be paid in full. The Banking Commissioner could not have permitted a third party to take the assets of the defaulting bank out of his control on any other terms, and there is no likelihood that the petitioner

would have made any such terms, consequently, if the agreement had not been made, the liquidation of the assets of the Peoples State Bank would have been conducted in the ordinary form of a receiver under the State Banking Commissioner, and the experience of such liquidations has always been that the loss to the depositors and others would be greater than where the liquidation was conducted, as it was, in the present case, by a friendly bank in the immediate neighborhood and well acquainted with the whole situation.

It is true that if the insured agrees to a material variance of the terms of the contract or relationship between him and the party whose fidelity is insured, to the prejudice of the insurer, the latter may be thereby relieved of its obligation. But such relief of the insurer is very narrowly limited to cases where there is truly such a variance, and it is actually material and is or will be actually prejudicial to the insurer's rights and interests. And the burden is on the insurer, in such a defense, to show that it has been or will be injured as the result of the alleged variance.

In *Philadelphia v. Ray,* 266 Pa. 345, it is said that in such a defense the insurer "must prove the change was material and prejudicial"; and those words are quoted with approval by the court in *Sokoloff v. Fidelity & Cas. Co.,* 288 Pa. 211, 215. The same rule was applied in *Conroy v. Commercial Cas. Ins. Co.,* 292 Pa. 219, 228. "In contracts of this kind, to escape liability, *the insurer must show* that the breach is something more than a technical departure from the letter of the bond,—that it is a departure that *results in substantial prejudice* and injury to its position". *Parmelee v. Aetna Life Ins. Co.,* 166 Fed. 741. It is the *insurer who must bear the burden* of showing these facts of material departure

from the original contract or relationship, and *actual loss or injury* to it as the result thereof.

The burden was on the petitioner to show that it had actually sustained prejudice by the making and carrying out of said agreement with the Trust Company, but it showed no such loss or prejudice and it made no effort to do so. It offered no testimony on that point, and the only testimony was that from the respondent's witnesses on the trial of the case, by which it is shown after five years that the liquidation as conducted really saved the Surety Company a large sum of money, and that it would have had to pay much more than the amount for which this judgment calls; unless it had been much more successful in liquidation than the Trust Company was, of which there is no evidence and no probability. As above stated there was no change in the contract between either the respondent and the petitioner, or between the respondent and George Kondor, the principal on the bond, and the burden is heavy upon the petitioner to show that the agreement so made and carried out caused it material damage or prejudice. In all fairness and equity, the petitioner should not be permitted to escape its liability under this bond to the amount charged against it in this suit, whereby it is manifest that it has been saved the difference between $100,000.00 and $41,600.00 under its paid fidelity and insurance bond, by which it obliged itself to indemnify the respondent against all loss or damage resulting from the acts of said Treasurer, George Kondor.

The decision in this case does not "unsettle the law of suretyship, nor does it introduce a radical relaxation of a well established rule". Neither does it "add an additional burden uncontemplated and uncompensated to millions of outstanding fidelity insurance written upon the basis of pre-existing law". Neither does it

"add confusion to the law of suretyship, by permitting, without the consent of the surety, the addition of new speculative risks which cannot be specified in advance or anticipated, resulting in general unsettlement of the schedule or rates of all commercial companies, to the discouragement of a business, the sphere of which is rapidly increasing in importance".

The general statements contained in petitioner's brief of argument are not based on all the facts of the case. The conclusions expressed are vague, indefinite and overdrawn. In fact, the law as laid down by the court in this case is in exact conformity with the existing law, and the rulings of the court can all be construed in the exact reverse of the terrifying picture attempted to be drawn by the pleader for the petitioner.

It is respectfully submitted that the ingenious and astute argument of the petitioner is biased, does not set forth all the issues involved, picks out only that which by the most strained effort can be argued in its favor and generally is a desperate attempt to escape liability for a just and honest obligation which it had been paid to assume.

The amount of the loss being exactly established and the liability therefor being fully proven, the verdict of the jury was correct under the law and the facts, the judgment was correctly affirmed by the Circuit Court of Appeals, there is no occasion for the review of its judgment in this Honorable Court, and leave to appeal should be refused.

Respectfully submitted,

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Attorneys for Appellee.